

May 17, 2010

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
U.S. DEPARTMENT OF ENERGY	)	Docket No. 63-001-HLW
	)	
(High-Level Waste Repository)	)	ASLBP No. 09-892-HLW-CAB04
	)	
	)	

NRC STAFF ANSWER TO DOE'S MOTION  
TO WITHDRAW ITS APPLICATION WITH PREJUDICE

INTRODUCTION

On March 3, 2010, the Department of Energy (DOE) filed the "U.S. Department of Energy's Motion to Withdraw" ("Motion") the license application for a proposed high-level waste repository at Yucca Mountain, Nevada. As set forth below, the Motion may be granted to the extent that it permits withdrawal of the license application but, under the current circumstances, withdrawal with prejudice is not justified.

BACKGROUND

The Nuclear Waste Policy Act (NWPA) of 1982 established the Federal government's intent to dispose of high-level radioactive waste in a deep geologic repository. Pub. L. No. 97-425, 96 Stat. 2201 (1982) (codified as amended at 42 U.S.C. § 10101 *et. seq.* (2006)). The NWPA designated DOE as the agency responsible for designing, constructing, operating and decommissioning a permanent disposal facility, *see id.* § 10134(b); designated the Environmental Protection Agency (EPA) as the agency responsible for developing safety standards for the repository, *id.* § 10141(a); and designated the NRC as the agency responsible

for developing regulations to implement EPA's safety standards and for licensing and overseeing construction and operation of the repository, *see id.* §§ 10134(c); 10141(b). Pursuant to the NWPA, DOE recommended three candidate sites for site characterization in 1986: Yucca Mountain, Nevada; Deaf Smith County, Texas; and Hanford, Washington. "Recommendation by the Secretary of Energy of Candidate Sites for the First Radioactive-Waste Repository," DOE/S-0048, May 1986 (LSN No. DEN000000972); *see also* NWPA § 112(b)(1)(B). In 1987, Congress ordered the cessation of site-specific activities at all candidate sites other than Yucca Mountain and amended the NWPA to designate Yucca Mountain as the single site for further study. Pub. L. No. 100-203 (101 Stat. 1330) (1987) section 5011 (codified at 42 U.S.C. § 10101 *et seq.*).

After further site characterization activities at Yucca Mountain, the Secretary of Energy recommended the site to the President for development of a repository.<sup>1</sup> "Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the Nuclear Waste Policy Act of 1982," February 2002, at 46 (DN2002307853). Subsequently, Congress designated Yucca Mountain for the development of a geological repository, via a joint resolution passed over the State of Nevada's disapproval. *See* Pub. L.

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<sup>1</sup> The Secretary also submitted the "Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada," dated February 2002 (FEIS), along with the site recommendation. DOE updated the FEIS in the "Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada," dated June 2008 (FSEIS). DOE also published two EISs related to transportation of high-level waste to the repository, "Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Waste at Yucca Mountain, Nye County, Nevada – Nevada Rail Transportation Corridor," dated June 2008 (Rail Corridor SEIS), and the "Final Environmental Impact Statement for a Rail Alignment for the Construction and Operation of a Railroad in Nevada to a Geologic Repository at Yucca Mountain, Nye County, Nevada," dated June 2008 (Rail Alignment EIS).

No. 107-200, 116 Stat. 735 (2002) (codified at 42 U.S.C. § 10135 note). President George W. Bush signed the joint resolution into law on July 23, 2002.

On June 3, 2008, DOE submitted the "Yucca Mountain Repository License Application," ("LA" or "application") seeking authorization to begin construction of a permanent high-level waste repository at Yucca Mountain, and, on June 17, 2008, the NRC provided notice of the availability of the application in the *Federal Register*. Yucca Mountain, Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008); corrected 73 Fed. Reg. 40,883 (July 16, 2008). On September 5, 2008, the NRC staff ("Staff") found that the LA contained sufficient information for the Staff to begin its detailed technical review, and accordingly, the Staff docketed the LA.<sup>2</sup> Department of Energy; Notice of Acceptance for Docketing of a License Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, NV, 73 Fed. Reg. 53,284 (Sept. 15, 2008).

On October 17, 2008, the Commission issued a "Notice of Hearing and Opportunity to Petition for Leave to Intervene," which provided that intervention petitions must be filed within 60 days. *U.S. Dep't of Energy (High-Level Waste Repository)*, CLI-08-25, 68 NRC 285 (2008); *see also* In the Matter of U.S. Department of Energy (High-Level Waste Repository); Notice of Hearing and Opportunity To Petition for Leave to Intervene on an Application for Authority To

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<sup>2</sup> Pursuant to section 114(f)(4) of the NWSA and 10 C.F.R. § 51.109(c), the Staff was required to adopt, to the extent practicable, DOE's EISs. The Staff undertook a review of these documents and determined that it was practicable to adopt the EISs, with supplementation. "U.S. Nuclear Regulatory Commission Staff's Adoption Determination Report for the U.S. Department of Energy's Environmental Impact Statements for the Proposed Geologic Repository at Yucca Mountain," dated September 5, 2008 (EISADR) (ADAMS Accession No. ML082420342; LSN No. NRC000029699); 73 Fed. Reg. at 53,285. The Staff found that neither the FEIS nor the FSEIS adequately addresses all the impacts on groundwater, or from surface discharges of groundwater, from the proposed action, and, therefore, additional information was required. EISADR at 5-1.

Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 63,029 (Oct. 22, 2008). Requests for a hearing were received from twelve entities: the State of Nevada; the Nuclear Energy Institute (NEI); Nye County, Nevada; the Nevada Counties of Churchill, Esmeralda, Lander and Mineral, jointly ("Four Counties"); the State of California; Clark County, Nevada; the County of Inyo, California; White Pine County, Nevada; the Timbisha Shoshone Tribe; the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation<sup>3</sup>; the Native Community Action Council (NCAC); and Caliente Hot Springs Resort, LLC. See *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 377-78 (2009), *aff'd in part, rev'd in part*, CLI-09-14, 69 NRC 580 (2009). Two entities filed requests to participate as interested government participants: Eureka County, Nevada and Lincoln County, Nevada. *Id.* at 378.

DOE filed answers to the intervention petitions on or before January 16, 2009. See *id.* at 379 n.20. The Staff responded to the intervention petitions on February 9, 2009. NRC Staff Answer to Intervention Petitions, filed February 9, 2009 ("Staff Answer"). On or before February 24, 2009, ten petitioners filed timely replies to the DOE and Staff answers. See *High-Level Waste Repository*, LBP-09-6, 69 NRC at 379 n.24. Following oral arguments on the intervention petitions in Las Vegas, Nevada on March 31 through April 2, 2009, the three Construction Authorization Boards (CABs or Boards) designated to rule on the petitions<sup>4</sup>

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<sup>3</sup> The Timbisha Shoshone Tribe and the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation were consolidated as a new entity representing the Tribe, JTS. *High Level Waste Repository*, LBP-09-6, 69 NRC at 429.

<sup>4</sup> On June 19, 2009, Construction Authorization Board 04 (CAB 04) was established "to preside over matters concerning discovery, Licensing Support Network compliance, new or amended contentions, grouping or consolidation of contentions, scheduling, [and] case management matters relating to any of the foregoing." "Establishment of Atomic Safety and Licensing Board," dated June 19, 2009. (continued. . .)

granted 10 petitions to intervene and admitted all but 17 of the 318 proposed contentions.<sup>5</sup> See *id.* at 499-500.

The Staff<sup>6</sup> and Clark County<sup>7</sup> appealed portions of the Boards' decision on contention admissibility on May 21, 2009. The Commission affirmed in part, and reversed in part, the Boards' decision to admit one contention, reversed the admission of three additional contentions, and affirmed the remainder of the Boards' contention rulings. *High-Level Waste Repository*, CLI-09-14, 69 NRC at 610.

On December 9, 2009, CAB 04 admitted five additional contentions filed after the original petitions to intervene. *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-09-29, 70 NRC \_\_ (slip op. at 14) (2009). The Board has yet to rule on NEV-SAFETY-203, which it construed to be a petition for rule waiver. See *id.* at 13.

Pursuant to "CAB Case Management Order #2," dated September 30, 2009, the proceeding was divided into stages, with the first stage, Phase I, including all safety,

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(. . .continued)

Subsequently, CAB 04 directed all further pleadings in this proceeding to be filed before CAB 04. Order (Filing and Accessing Pleadings), dated November 20, 2009.

<sup>5</sup> At the time of the Board's initial ruling on contention admissibility, neither NCAC nor JTS had demonstrated substantial and timely compliance with Licensing Support Network (LSN) requirements pursuant to 10 C.F.R. § 2.1012(b) and, therefore, were not admitted as full parties. *High-Level Waste Repository*, LBP-09-6, 69 NRC at 446-451. Both parties subsequently complied and were admitted to the proceeding on August 27, 2009. Order (Granting Party Status to Native Community Action Council), dated August 27, 2009; Order (Granting Party Status to the Joint Timbisha Shoshone Tribal Group), dated August 27, 2009.

<sup>6</sup> NRC Staff Notice of Appeal of LBP-09-06 and NRC Staff Brief in Support of LBP-09-06, filed May 21, 2009.

<sup>7</sup> Clark County, Nevada's Notice of Appeal of LBP-09-06, Memorandum and Order of May 11, 2009, and Clark County, Nevada's Brief on Appeal of LBP-09-06, Memorandum and Order of May 11, 2009, filed May 21, 2009.

environmental or legal contentions related to the subject matter reviewed in Volume 1 or Volume 3 of the Staff's Safety Evaluation Report (SER). Formal Phase I discovery began with the submission of initial witness disclosures by the parties on or before October 10, 2009. CAB Case Management Order #2 at 5. Depositions were scheduled to begin on February 16, 2010. *Id.* at 7. Briefing on Phase I legal issue contentions began on December 7, 2009, see Order (Identifying Phase I Legal Issues for Briefing), dated October 23, 2009, and oral argument was held on the Phase I Legal Issues on January 26 and 27, 2009. Order (Scheduling Oral Argument), dated January 7, 2009.

A DOE "Motion to Stay the Proceeding," filed on February 1, 2010 ("Stay Motion") stated that the President, in the proposed budget for fiscal year 2011, "directed that the Department of Energy 'discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010 . . . .'" Stay Motion at 1. The Stay Motion further stated that the proposed budget indicated that all DOE funding for Yucca Mountain would be eliminated in 2011.<sup>8</sup> *Id.* Therefore, DOE stated its intent to withdraw the license application by March 3, 2010, and requested a stay of the proceeding in order to avoid unnecessary expenditure of resources by the Board and parties. See Stay Motion at 2. CAB 04 granted a stay of the proceeding on February 16, 2010.<sup>9</sup>

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<sup>8</sup> The Stay Motion referenced statements in the proposed budget prepared by the Office of Management and Budget for Fiscal Year 2011. Budget of the U.S. Government, Fiscal Year 2011, Appendix at 437 (available at <http://www.whitehouse.gov/omb/budget/fy2011/assets/doe.pdf>).

<sup>9</sup> Order (Granting Stay of Proceeding), dated February 16, 2010 (unpublished) (slip op.).

On March 3, 2010, DOE filed the instant Motion to withdraw its LA with prejudice. Five late-filed intervention petitions were filed to oppose the Motion.<sup>10</sup> On April 5, 2010, the participants completed briefing on three of these intervention petitions: South Carolina, Washington, and Aiken County.<sup>11</sup> On April 6, 2010, the Board suspended briefing on the intervention petitions of the Prairie Island Indian Community and the National Association of Regulatory Utility Commissioners and the DOE Motion to Withdraw, until further notice.<sup>12</sup> Both DOE and Nye County petitioned the Commission for interlocutory review of the April 6, 2010 Board order.<sup>13</sup> On April 23, 2010, the Commission vacated the April 6, 2010 Board order and remanded the matter back to the Board for resolution of the DOE Motion to Withdraw by June 1, 2010.<sup>14</sup> Briefing on the intervention petitions of the Prairie Island Indian Community and the National Association of Regulatory Utility Commissioners was completed on May 11, 2010.<sup>15</sup>

The Staff's answer to DOE's Motion to withdraw its LA with prejudice is set forth below.

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<sup>10</sup> Petition of the State of South Carolina to Intervene, dated February 26, 2010 ("South Carolina Petition"); State of Washington's Petition for Leave to Intervene and Request for Hearing, dated March 3, 2010 ("Washington Petition"); Petition of Aiken County, South Carolina, to Intervene, dated March 4, 2010 ("Aiken Petition"); Petition to Intervene of the Prairie Island Indian Community, dated March 15, 2010 ("PIIC Petition"); National Association of Regulatory Utility Commissioners Petition to Intervene, dated March 15, 2010 ("NARUC Petition").

<sup>11</sup> See Order (Concerning Scheduling), dated March 5, 2010 (unpublished) (slip op. at 2).

<sup>12</sup> Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion), dated April 6, 2010 (unpublished) (slip op. at 13).

<sup>13</sup> U.S. Department of Energy's Petition for Interlocutory Review, dated April 12, 2010; Nye County Nevada's Petition for Interlocutory Review of CAB04 April 6, 2010 Order, dated April 15, 2010.

<sup>14</sup> *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-10-13, 71 NRC \_\_ (April 23, 2010) (slip op. at 5). The Board indicated that it would decide DOE's Motion to Withdraw by June 30, 2010. Order (Setting Briefing Schedule), dated April 27, 2010 (unpublished) (slip op. at 2).

<sup>15</sup> Order (Setting Briefing Schedule), dated April 27, 2010 (unpublished) (slip op. at 2).

## DISCUSSION

DOE requests that its LA be withdrawn with prejudice. Motion at 1. DOE explains that “it does not intend ever to refile an application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain.” *Id.* at 3 n.3. Since the Secretary of Energy and President have decided not to pursue a geologic repository at Yucca Mountain, DOE seeks to avoid further expenditure of funds on a licensing proceeding for the Yucca Mountain project. *See id.* at 1-2. DOE further argues that the Secretary of Energy has determined that withdrawal of the LA with prejudice is appropriate, and that the Board should defer to this judgment. Motion at 4. DOE acknowledges its obligation under the NWPA to file the LA, but asserts that “[n]othing in the text of the NWPA strips the Secretary of an applicant’s ordinary right to seek dismissal” pursuant to 10 C.F.R. § 2.107. *Id.*

As discussed further below, DOE’s motion to withdraw may be granted by the Board, but dismissal *with prejudice* is inconsistent with NRC case law. In addition, withdrawal *with prejudice* is inappropriate under the present circumstances.

### A. Standards Governing Withdrawal

Under the NWPA and the Commission’s regulations and case law, CAB 04 may grant withdrawal of DOE’s LA. Section 114(d) of the NWPA provides as follows:

The Commission shall consider an application for a construction authorization for all or part of a repository *in accordance with the laws applicable to such applications*, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of submission of such application....

NWPA, § 114(d), 42 U.S.C. § 10134(d) (emphasis added). Plainly, this section directs the NRC to consider an application, but it does not create any obligation on the part of the NRC if an application is no longer before it for consideration. The direction for the Commission to consider an application “in accordance with the laws applicable to such applications” reflects that

Congress intended the NRC to consider DOE's application consistent with the usual processes and procedures under which NRC executes its statutory mandate to consider license applications. This includes 10 C.F.R. § 2.107, which allows the presiding officer to condition the withdrawal of an application on such terms as it may prescribe after a notice of hearing has been issued. As discussed below, NRC licensing boards have permitted withdrawal of applications in the past.

For example, in *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 & 2), ALAB-657, 14 NRC 967, 970 (1981) ("*Fulton*"), the applicant requested permission to withdraw, without prejudice, its construction permit application for a nuclear reactor. Two of the intervenors requested that the withdrawal be with prejudice. *Id.* The licensing board granted the intervenors' request and dismissed the proceeding with prejudice, and the matter was appealed. *Id.* at 971. The NRC Appeal Board noted that the meaning of "with prejudice" was unclear because neither the intervenors' request for dismissal with prejudice nor the licensing board's decision defined the phrase. *Id.* at 973. The Appeal Board opined that "with prejudice" could have several meanings, but interpreted the dismissal with prejudice as precluding the applicant from ever filing a new application to construct any type of reactor at the same site. *Id.*

The Appeal Board confirmed that 10 C.F.R. § 2.107(a) "gives the boards substantial leeway" in conditioning voluntary withdrawal of applications, but noted that the conditions "must bear a rational relationship to the conduct and legal harm at which they are aimed. And, of course, the record must support any findings concerning the conduct and harm in question." *Id.* at 974 (citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5<sup>th</sup> Cir. 1976)). In *Fulton*, the Appeal Board found the effective prohibition against the applicant's future use of the site for any type of nuclear reactor to be particularly harsh and punitive and concluded that "[t]he conduct and harm for which dismissal *with prejudice* is intended to serve as the remedy, therefore, must

be of comparable magnitude.” *Id.* (emphasis added). Because the licensing board did not show that the harm sought to be remedied was comparable to the severity of the dismissal with prejudice, the Appeal Board vacated the licensing board’s decision. *Id.* at 974, 979 (“In the absence of a demonstrated injury to a private or public interest, we cannot affirm the Board’s dismissal of [the] application with prejudice.”).

Another Appeal Board decision, *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1131 (1981) (“*North Coast*”), further illustrated the meaning and application of dismissal with prejudice. In *North Coast*, the applicant for a nuclear reactor construction permit withdrew its application and filed a motion to terminate the proceeding. The intervenor requested that the dismissal be with prejudice, but the licensing board terminated the proceeding without prejudice. *Id.* at 1131-32. The Appeal Board stated that three factors underlie the standard for determining whether a reactor construction permit proceeding should be terminated with prejudice:

- (1) it is highly unusual to dispose of a proceeding on the merits, *i.e.*, *with prejudice*, when in fact the health, safety and environmental merits of the application have not been reached;
- (2) the effect [effort] spent in pursuing a nuclear power plant application at the same site for a second time is presumptively preceded by a judgment, entitled to some credence, that there exists a public interest need for the plant’s power; and
- (3) the number of potentially acceptable sites for a nuclear power plant are perforce limited: they should not be eliminated from further consideration absent good and sufficient reason.

*Id.* at 1133 (emphasis in original).

The *North Coast* Appeal Board noted that the party requesting a severe and unusual sanction, such as withdrawal with prejudice, bears “a more compelling burden of justification—both for its imposition and for demonstrating that the allegation should be pursued in the shape of an evidentiary hearing.” *Id.* In order to hold a hearing on whether the withdrawal should be

with prejudice, the allegations must be serious and “supported by a showing, typically through affidavits or unrebutted pleadings, of sufficient weight and moment to cause reasonable minds to inquire further.” *Id.* at 1133-34.

Therefore, as discussed above, the Board is authorized to permit withdrawal of the LA, and may attach appropriate conditions to the withdrawal. However, to dismiss the proceeding *with prejudice* requires a showing on the record of injury to a private or public interest that cannot be remedied through conditions on the withdrawal of the LA without prejudice.

B. The Board Is Authorized Under the Nuclear Waste Policy Act to Permit Withdrawal of the LA

Section 114(d) of the NWPA provides, in part, as follows:

The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of submission of such application, except that the Commission may extend such deadlines by not more than 12 months if, not less than 30 days before such deadlines, the Commission complies with the reporting requirements established in subsection (e)(2).

NWPA, § 114(d), 42 U.S.C. § 10134. As discussed above in Section A, Standards Governing Withdrawal, section 114(d) effectively directs the Commission to consider DOE's application in accordance with its usual processes and procedures governing such applications, which includes 10 C.F.R § 2.107. Section 2.107 was originally promulgated in 1962 and amended in 1963 to address withdrawal of an application after a notice of hearing has been issued. Part 2—Rules of Practice, Part 3—Rules of Procedure in Contract Appeals: Revision of Rules, 27 Fed. Reg. 377, 379 (Jan. 13, 1962); Part 2—Rules of Practice: Miscellaneous Amendments, 28 Fed. Reg. 10,151, 10,152 (Sept. 17, 1963). Because Congress is presumed to know the state of the law at the time it enacts legislation, *e.g.*, *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-02-29, 56 NRC 390, 401 (2002), the Board should presume that

when Congress enacted the NWPA, it was aware that the Commission's usual processes and procedures, specifically 10 C.F.R. § 2.107, allowed applicants to withdraw license applications.

Section 2.107 was promulgated pursuant to the Commission's authority under the AEA. See 27 Fed. Reg. at 377. Where two statutes are capable of coexistence, each should be regarded as effective unless there is a clear expression of congressional intent otherwise. See, e.g., *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-02-29, 56 NRC 390, 401 (2002) (footnote omitted). "One of the strongest maxims of statutory interpretation is that the law disfavors implied repeals." *Id.* (footnote omitted). While 10 C.F.R. § 2.107 is not a statute, it was promulgated pursuant to NRC's authority under the AEA, and the same principle should apply with respect to statutes and administrative agency regulations when they are capable of coexistence. Therefore, 10 C.F.R. § 2.107 should be given effect unless Congress clearly expressed its intent to limit the applicability of the AEA or Commission rules enacted pursuant to the AEA. Because the NWPA does not reflect a limitation on the applicability of the AEA or the applicable Commission rules<sup>16</sup> and because § 114(d) of the NWPA can be interpreted so that § 114(d) and 10 C.F.R. § 2.107 can both be given effect, 10 C.F.R. § 2.107 should be viewed as applicable in this proceeding.

In § 114(d) of the NWPA, the clause immediately following the direction to consider the application in accordance with applicable laws, "except that the Commission shall issue a final decision...not later than the expiration of 3 years after the date of submission of such application," charges the NRC with issuing a final decision within three years (or 4 years if

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<sup>16</sup> As noted earlier, NRC is to consider the LA "in accordance with the laws applicable to such applications." NWPA, § 114(d), 42 U.S.C. § 10134.

certain conditions are met). However, this clause does not preclude the applicability of 10 C.F.R. § 2.107. The Commission interpreted this clause when it amended the 10 C.F.R. Part 2 rules applicable to the use of the Licensing Support Network in 2001. Licensing Proceedings for the Receipt of High-Level Radioactive Waste at a Geologic Repository: Licensing Support Network, Design Standards for Participating Websites, 66 Fed. Reg. 29,453, 29,453 n.1 (May 31, 2001). The Commission stated that it interprets the NWPA § 114(d) three-year schedule requirement to mean “three years from the docketing of the application” rather than three years from DOE’s submission of the application because such an “interpretation is consistent with the Commission’s general practice since its establishment in 1975 to tie hearing schedules to the docketing of a license application rather than the tendering of the application by the applicant, for the obvious reason that a license application may be substantially deficient in some material respect and must be returned to the applicant.” *Id.* When providing the NRC responsibility for approving or disapproving the issuance of a construction authorization, Congress intended for the NRC to make a substantive, considered decision on the DOE LA. However, the three-year schedule requirement establishes a deadline for the NRC to issue a decision on the LA with the expectation that an LA would still be before the NRC. But the section simply does not address the authority of DOE to withdraw such application, nor the authority of the NRC to permit such withdrawal. Accordingly, the three-year schedule requirement does not vitiate the applicability of § 2.107; nor does it constrain or limit the Commission’s authority under that section. Accordingly, the Board is authorized to assent to the dismissal of the DOE LA.

It could be argued that, since § 113 of the NWPA provides a method for DOE to discontinue the Yucca Mountain project during site characterization and § 114 does not provide a similar method in the site approval and construction authorization phase, the NWPA should be

interpreted to constrain or limit the Board's authority to grant withdrawal pursuant to 10 C.F.R. § 2.107. NWPA, § 113(c)(3), 42 U.S.C. § 10133(c)(3); see NWPA, § 114, 42 U.S.C. § 10134. However, this argument is not persuasive because, during the site characterization period, the LA had not yet been submitted to the NRC, and therefore, the Commission's rule regarding withdrawal did not apply. At the time of the LA submittal, the process had moved beyond the site characterization period into the "Site Approval and Construction Authorization" period under § 114.<sup>17</sup> As discussed above in Section A, Standards Governing Withdrawal, § 114 in effect directs that the Commission's usual process regarding withdrawal applies. Accordingly, Congress did not need to specifically provide a method for DOE to discontinue the project if DOE determined the site was not suitable. Congress knows how to draft legislation that clearly states its intent. *E.g., Private Fuel Storage*, CLI-02-29, 56 NRC at 397. If Congress intended to prohibit DOE from withdrawing its LA once it was submitted to the NRC, it could have specified that in the NWPA. It did not do so.

C. DOE Has Not Demonstrated that Withdrawal With Prejudice Is Justified

The NWPA directs that the NRC "shall consider an application" for a high-level waste repository submitted by DOE. NWPA, as amended, § 114(d), 42 U.S.C. § 10134(d). The plain meaning of the phrase "shall consider" is that the NRC must judge or make a decision regarding an application from DOE for a construction authorization. Because dismissal with prejudice implies, and is ordinarily associated with, a ruling on the merits and because of the NWPA's mandate for the NRC to consider "an application," it would be inappropriate for the NRC to grant

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<sup>17</sup> See Letter from Dr. Margaret Chu, Dir., DOE Office of Civilian Radioactive Waste Mgmt. to Chairman Diaz (July 11, 2003) (ML032020301).

DOE's motion for withdrawal of the license application *with prejudice*. At this stage, the NRC has not made a decision on the merits of the LA, and the NWPA remains in effect and directs NRC to consider "an application."<sup>18</sup> If DOE withdraws its current LA but submits an LA for Yucca Mountain in the future, NRC's existing statutory mandate would require NRC to review that future application. Thus, the NRC could not at that time decline to conduct its review because of an earlier dismissal "with prejudice." Accordingly, in light of NRC's ongoing statutory obligation to consider a license application for Yucca Mountain, dismissal with prejudice of the LA would not be appropriate at this time.

Further, DOE has not demonstrated that withdrawal of its LA with prejudice is necessary or otherwise justified. DOE claims that the Board should defer to the Secretary's "judgment that scientific and engineering knowledge on issues relevant to disposition of high-level waste and spent nuclear fuel has advanced dramatically over the twenty years since the Yucca Mountain project was initiated" and "that dismissal of the pending application with prejudice is appropriate

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<sup>18</sup> Some have argued that this language precludes any withdrawal of the application. See South Carolina Petition at 25; Washington Petition at 16; PIIC Petition at 15-16; NARUC Petition at 24-25. While this argument is not consistent with the position of the Staff, should the Board decide that any withdrawal (whether with or without prejudice) is not permissible at this time, the Clinch River Breeder Reactor Plant (CRBRP) case provides some guidance on how the Board might proceed. In that case, a licensing board suspended the proceeding, which involved a cooperative effort between industry and government to create a demonstration-scale fast breeder reactor. *Dep't of Energy Project Mgmt. Corp. Tenn. Valley Auth.* (Clinch River Breeder Reactor Plant), LBP-84-4, 19 NRC 288, 294 (1984), *vacated in part*, ALAB-761, 19 NRC 487 (1984) (vacating the licensing board's decision to limit participation in the limited work authorization proceeding). The Energy Research and Development Administration (ERDA), which later became part of DOE, was included in the CRBRP cooperative effort. *Id.* at 295. The case was suspended at the applicants' request after the Carter Administration announced its opposition to the CRBRP project in April 1977. *Dep't of Energy Project Mgmt. Corp. Tennessee Valley Auth.* (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 542 (1983). After a change in administration in 1981, the suspension was lifted and the proceeding continued. *Id.* Ultimately, the applicants agreed to terminate the project after Congress declined to appropriate funds for the project in FY 1984. *Clinch River*, LBP-84-4, 19 NRC at 291; *Dep't of Energy Project Mgmt. Corp. Tennessee Valley Auth.* (Clinch River Breeder Reactor Plant), LBP-85-7, 21 NRC 507, 508 (1985). The construction application was withdrawn, and the proceeding was dismissed without prejudice. *Clinch River*, LBP-85-7, 21 NRC at 515.

here.” Motion at 3-4. DOE argues that dismissal with prejudice will provide finality to the Yucca Mountain project and will enable the Blue Ribbon Commission to focus on alternative methods for dealing with high-level waste and spent nuclear fuel. *Id.* at 3. DOE asserts that the Secretary of Energy is the appropriate entity to decide whether withdrawal with prejudice is in the public interest because section 3 of the Atomic Energy Act of 1954, as amended, (“AEA”), gives the Secretary broad authority to carry out the AEA’s purposes. *Id.* at 4 n.5. However, that section does not give the *Secretary* alone the authority to direct the Government’s “control of the possession, use, and production of atomic energy and special nuclear material.” Rather, it states that one of the Act’s purposes is to provide for “a program of *Government* control” of such material. AEA, § 3(c), 42 U.S.C. § 2013(c) (2006) (emphasis added). The reference to “Government” in section 3 of the AEA applies to both DOE and NRC. *See, e.g.*, H.R. REP. NO. 93-707, at 26 (1973). Accordingly, section 3 does not require NRC to defer to the Secretary’s judgment that attaching the “with prejudice” condition to withdrawal of the LA is necessary or otherwise appropriate.

DOE also claims that the NRC must defer to the judgment of the Executive Branch that dismissal with prejudice is in the public interest. Motion at 3-4 & n.4 (citing *Dep’t of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 377 (2004); *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-03-30, 58 NRC 454, 472 (2003); *Environmental Radiation Protection Standards for Nuclear Power Operations*, 40 CFR 190, CLI-81-4, 13 NRC 298, 307 (1981); *Pacific Gas & Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45 (1983) (“*Stanislaus*”). While these cases indicate that NRC defers to the opinions of other agencies in certain circumstances, they do not mandate that CAB 04 prescribe conditions on the withdrawal of the LA (*i.e.*, with prejudice) without regard to NRC precedent interpreting § 2.107. Under NRC case law, attaching the condition of “with prejudice”

to the withdrawal requires a demonstration, on the record, that the condition is necessary to alleviate the legal harm at which it is aimed. See, e.g., *Fulton*, ALAB-657, 14 NRC at 974, 979. Where the NRC has deferred to the opinion of another agency, that agency had explicit authority to take the particular action to which NRC deferred.

For example, in CLI-04-17, the Commission noted that, contrary to the intervenors' assertion, the Department of State found that the proposed export of plutonium oxide would not be inimical to the common defense and security. *Plutonium Export License*, CLI-04-17, 59 NRC at 374. The Commission stated that "[t]he Executive Branch's noninimicality determinations involve 'strategic judgments' and foreign policy and national security expertise regarding the common defense and security of the United States, and the NRC may properly rely on those conclusions." *Id.* (citations omitted). This decision was made in the context of export licensing, where the Commission has a specific statutory directive to seek the position of the Executive Branch. Section 126 of the AEA prohibits the NRC from issuing an export license for any production or utilization facility, source material, or special nuclear material until it "has been notified by the Secretary of State that it is the judgment of the executive branch that the proposed export...will not be inimical to the common defense and security." AEA, § 126a.(1), 42 U.S.C. § 2155. The NRC's reliance on Department of State noninimicality findings in the export licensing area, where there is a specific statutory directive that requires deference to the Executive Branch, does not support DOE's argument that the NRC should defer to DOE's judgment here. By contrast, there is nothing in the NWPA or AEA that directs the NRC to consider or defer to the Secretary's judgment on whether the public interest would be served by attaching a "with prejudice" condition to the withdrawal of the application. Accordingly, DOE must satisfy the standards set forth in Commission case law in order to withdraw its application with prejudice.

Similarly, in *Private Fuel Storage*, the licensing board deferred to the judgment of the Bureau of Land Management (“Bureau”) regarding the wilderness status of a tract of land. LBP-03-30, 58 NRC at 472. The land in question was overseen by the Bureau, which is charged with studying tracts of public land for designation as wilderness area under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a), (b). See *id.* at 464-65. In *Private Fuel Storage*, the Bureau was clearly acting within its authority when it found the area to be lacking in wilderness characteristics; also, the NRC did not have any statutory authority or expertise with respect to wilderness designations. Accordingly, deferral to the Bureau’s expertise in that case was both necessary and appropriate. Here, however, there is nothing in the NWPA or AEA that directs the NRC to defer to the Secretary’s judgment on whether attaching a “with prejudice” condition to the withdrawal of the LA is appropriate.

DOE’s final example of NRC’s deferral to the judgment of the Executive Branch is a case where NRC did not stay implementation and enforcement of rules of the Environmental Protection Agency (EPA). *Environmental Radiation Protection Standards for Nuclear Power Operations*, 40 CFR 190, CLI-81-4, 13 NRC 298, 307 (1981). In that case, petitioners sought to stay implementation and enforcement of EPA’s radiation protection standards, and NRC’s corresponding rules, for NRC-licensed uranium mills. *Id.* at 298, 300. The Commission denied the petitions “[b]ecause EPA is the agency authorized to issue generally applicable radiation standards” and the NRC “does not sit as a reviewing court for a sister agency’s regulations.” *Id.* at 307, 301. In CLI-81-4, EPA had clear authority to promulgate radiation protection standards, and “[i]t is well established that each agency’s regulations are presumed valid until the promulgating agency or a court modifies or invalidates them.” *Id.* at 301. In short, the Commission declined to interfere with the applicability and administration of the rules of a different agency. That is not the case here. Like *Clinch River* and *Private Fuel Storage*,

CLI-81-4 does not compel the conclusion that the NRC must defer to the Secretary of Energy's judgment that it is appropriate to condition withdrawal of its license application on doing so with prejudice.

DOE cites *Stanislaus*, LBP-83-2, 17 NRC 45, for the proposition that the Commission need not judge whether an applicant's decision to withdraw an application is sound. Motion at 4 n.4. However, here, DOE does not seek simply to withdraw the application, but to do so *with prejudice*, which could involve considerations of soundness, or at a minimum, whether the requested relief is consistent with NRC regulations and applicable law. The Board must determine whether the condition bears a rational relationship to the conduct and legal harm at which it is aimed. See, e.g., *Fulton*, ALAB-657, 14 NRC at 974.

DOE has not made the requisite showing of harm to private or public interests that would result if the Board simply ordered that the LA be withdrawn—without attaching the condition that such withdrawal be with prejudice. See *Fulton*, ALAB-657, 14 NRC at 974, 979; *North Coast*, ALAB-662, 14 NRC at 1132-34. In the absence of such a showing, application of NRC case law leads to the result that the Board should grant the withdrawal without the additional condition of prejudice. See *id.*

DOE claims that dismissal with prejudice would provide finality to the project and allow the Blue Ribbon Commission to focus on alternatives. Motion at 3. In establishing the Blue Ribbon Commission, the Administration directed it to focus on "all alternatives for the storage, processing, and disposal of civilian and defense used nuclear fuel and nuclear waste." Memorandum of January 29, 2010: Blue Ribbon Commission on America's Nuclear Future, 75 Fed. Reg. 5485 (Feb. 3, 2010). Furthermore, the Blue Ribbon Commission was given 24 months, beginning on January 29, 2010, to issue a final report and has already begun its work. See *id.*; Notice of Open Meeting, 75 Fed. Reg. 10,791 (Mar. 9, 2010); Notice of Open

Meeting, 75 Fed. Reg. 25,850 (May 10, 2010). It is unclear how dismissal of the LA without prejudice would adversely affect the Blue Ribbon Commission's work. DOE does not allege any basis for the NRC to conclude that, nor has DOE demonstrated on the record why, dismissal with prejudice is necessary to alleviate harm that would result from dismissal without prejudice. In fact, it can fairly be argued that dismissal "with prejudice" is not consistent with the public interest because such a condition would unnecessarily preclude waste disposal options that might otherwise be available to Government leadership in the future.

D. Implementation of the President's Proposed Budget

DOE's Motion was prompted by a decision to discontinue the pending LA, which was announced in the President's proposed budget for FY 2011. See Motion at 2, n.2. However, this proposed budget does not have binding legal effect because Congress, not the President, is responsible for enacting the budget into law. Because Congress has not yet determined what Nuclear Waste Funds, if any, will be appropriated to DOE relating to the LA in FY 2011, dismissal with prejudice is inappropriate.

If Congress does enact the President's proposed budget, the legal effect of the appropriation will depend on the language in the appropriations statute. In general, a "provision in an annual appropriations bill presumptively applies only during the fiscal year to which the bill pertains." *Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 224 (1st Cir. 2003). Therefore, all provisions of the NWPA (including the requirement that NRC consider a license application for Yucca Mountain) would remain in effect unless the FY 2011 appropriation is given the effect of permanent legislation.

There is a general presumption against construing an appropriation act as permanent legislation "unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent." U.S. Gov't Accountability Office, *Principles of Federal*

*Appropriations Law*, Vol. I at 2-34 (3d ed. 2004). Congress indicates permanence through use of "'words of futurity' such as 'hereafter' or 'after the date of approval of this act.'" 65 Comp. Gen. 588, 589 (1986). There are six factors in addition to "words of futurity" that may indicate that Congress intends an appropriations act to be permanent legislation: (1) whether the provision occurs in subsequent appropriations acts, 32 Comp. Gen. 11, 12-13 (1952); (2) whether the provision is included in the United States Code, *Principles of Federal Appropriations Law* at 2-37; (3) whether the legislative history of an appropriations statute supports interpreting the statute as permanent legislation, *id.* at 2-38; (4) whether the provision is worded as a positive authorization rather than a restriction on the use of an appropriation, *id.* at 2-38; (5) whether "the provision [in question] bears no direct relationship to the appropriation act in which it appears, [which] is an indication of permanence," *id.*; and (6) whether construing the provision as other than permanent would result in a meaningless or absurd result, *id.*

Because none of the above factors may be analyzed until after Congress enacts a FY 2011 appropriations statute, it is impossible to determine whether any Yucca Mountain-related appropriation could be interpreted as permanent legislation that amends or nullifies the NWPA. Therefore, dismissal with prejudice is inappropriate at this juncture.

CONCLUSION

For the foregoing reasons, the Board should grant DOE's request to withdraw the LA, but deny DOE's request to attach the "with prejudice" condition.

Respectfully submitted,

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**/Executed in accord with 10 C.F.R. § 2.304(d)/**

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Dated at Rockville, Maryland  
this 17<sup>th</sup> day of May, 2010

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
U. S. DEPARTMENT OF ENERGY	)	Docket No. 63-001-HLW
	)	
(High-Level Waste Repository)	)	ASLBP No. 09-892-HLW-CAB04
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO DOE'S MOTION TO WITHDRAW ITS APPLICATION WITH PREJUDICE" in the above-captioned proceeding have been served on the following persons this 17<sup>th</sup> day of May, 2010, by Electronic Information Exchange.

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